IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 474

ROBERT D. ELDER, GREENE CHANDLER FURMAN, *Petitioners*

v.

CHARLES F. BRANNAN, Secretary of Agriculture, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

C. L. DAWSON,
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GREENE CHANDLER FURMAN,
Attorneys for Petitioners.

December, 1950

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CITATIONS

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Robert D. Elder and Greene Chandler Furman, petitioners, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia entered in the above-entitled case on June 15, 1950.

OPINIONS BELOW.

The opinion of the United States District Court for the District of Columbia (R. 72) has not been officially reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 88) is reported at 184 F. 2d 219.

JURISDICTION.

The judgments of the United States Court of Appeals for the District of Columbia were entered on June 15, 1950 (R. 96). The Government's petitions for rehearing were denied October 2, 1950. Additional time for filing petition for writ of certiorari was requested by the Government and extended to January 2, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED.

1. Whether Civil Service Commission regulations for reduction in force—insofar as such regulations grant to nonveteran employees "according to tenure of employment" [under subgroups A-2, A-4] superior retention preference rights over veterans' preference employees whose efficiency ratings are "good" or better [subgroups B-1, C-1]—are inconsistent with and in violation of retention preference rights secured to such veterans under §§ 2, 12, 14, and 18 of the Veterans' Preference Act of 1944 and/or rights possessed by such veterans under the proviso of § 4 of the Act of August 23, 1912, and under § 3 of the Act of August 15, 1876, as such rights are broadened, and in no respect narrowed, by the Veterans' Preference Act of 1944, and embodied in the Act of 1944.

2. Whether agency action in a reduction in force in a Federal Department in the District of Columbia—whereby veterans' preference employees whose efficiency ratings are "good" or better in civilian positions of Attorney, Grade P-3, are discharged effective June 30, 1947, while other nonveteran nonpreference employees are retained in such positions of Attorney, Grade P-3, in preference to such veterans "according to tenure of employment"—is in violation of retention preference rights of such veterans under applicable statutes aforesaid.

3. Whether agency action in a reduction in force in a Federal Department in the District of Columbia—whereby veterans' preference employees whose efficiency ratings are "good" or better in civilian positions of Attorney, Grade P-3, are dropped and excluded from duty since June 6, 1947, while nonveteran employees are retained continuously on active duty in such positions of Attorney, Grade P-3,—is in violation of rights of such veterans under applicable statutes aforesaid.

4. Whether the above-described discharge, dropping, and/or exclusion from duty is to be regarded as in direct violation of the proviso of § 4 of the Act of August 23, 1912, and/or of the proviso of § 3 of the Act of August 15, 1876.

5. Whether, in such a reduction in force, §§ 2, 12, and 18 of the Veterans' Preference Act of 1944 require that any veterans' preference employee whose efficiency rating is "good" or better in a position of Attorney, Grade P-3, shall be retained in preference to any nonveteran employee in such a position of Attorney, Grade P-3, without regard to tenure of employment and length of service as between such veteran and nonveteran, and without regard to the efficiency rating of the nonveteran.

6. Whether, if the material allegations in the record remain substantially as they are, the District Court should enter summary judgments to the effect that since June 6, 1947, each of these veteran petitioners has been wrongfully denied his statutory right to be retained on active duty in his position of Attorney, Grade P-3, and is entitled to reinstatement therein as of June 6, 1947.

7. Whether, if the material allegations in the record remain substantially as they are, the District Court should enter summary judgments to the effect that since June 30, 1947, each of these veteran petitioners has been wrongfully denied his statutory right to be retained on active duty in his position of Attorney, Grade P-3, and is entitled to reinstatement therein as of June 30, 1947.

8. Whether, if the material allegations in the record remain substantially as they are, the District Court should enter summary judgments to the effect that each of these petitioners has been entitled since August, 1944, to the tenure of employment designated as permanent or classified (competitive) civil service status, and that such tenure and status has been wrongfully denied him.

STATUTES AND REGULATIONS INVOLVED.

The proviso of § 4 of the Act of August 23, 1912, § 4, 37 Stat. 413, 5 U. S. C. A. § 648, provides as follows:

> *Provided,* That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary.

This proviso immediately follows the provisions quoted herewith:

> Sec. 4. The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia * * * Copies of all records of efficiency shall be furnished by the departments and independent establishments to the Civil Service Commission for record in accordance with the provisions of this section: *Provided* (*et seq. supra*) * * *

The Veterans' Preference Act of June 27, 1944, 58 Stat. 387, 5 U. S. C., Supp. V, §§ 851-869, provides in pertinent part as follows:

> Sec. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; * * * preference shall be

given to * * * (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, * * * and have been separated therefrom under honorable conditions.

* * * * * * * * * *

Sec. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings; * * * *Provided further,* That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees * * *.

* * * * * * * * * *

Sec. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

Pertinent provisions of the Civil Service Commission regulations (5 Code Fed. Regs. § 20.3, Supp. 1947) are set forth *infra* under *Statement.* pp. 7-8, 12-13.

STATEMENT.

Each of the petitioners was honorably discharged from the United States Army after wartime service on active duty in the Infantry—Elder during World War I and Furman during World War II (R. 3, 50, 77). Each of the petitioners was continuously employed from August 1, 1943, through June 6, 1947, in a civilian position of Attorney, Grade P-3, in the Department of Agriculture, Washington, D. C., and had at all times efficiency ratings of

"good" or better (R. 3, 50, 78). On May 29, 1947, each of the petitioners received written notice dated May 29, 1947, stating: "A reduction in force brought about by lack of funds necessitates your being separated effective on or after June 30, 1947, c. o. b. Your last day of active duty in your present position will be June 6, 1947" (R. 4, 8, 51).

Since June 6, 1947, each of the petitioners has been dropped and excluded from duty in his position of Attorney, Grade P-3, while five women and three men, all nonveterans, have been retained in continuous employment on active duty in such positions of Attorney, Grade P-3, since June 6, 1947 (R. 48, 50-51, 23-24). On *July* 30, 1947, respondent gave each petitioner "formal notification of your separation due to reduction in force effective June 3, 1947" (R. 60, 46). The petitioners' positions have not been abolished, but have been filled by other nonveteran Attorneys, Grade P-3, who have since June 6, 1947, been continuously performing work, functions, and duties which were formerly performed by each of the petitioners (R. 50-51, 14).

The eight nonveteran Attorneys, Grade P-3, above referred to as retained in preference to the veteran petitioners, were each carried on respondent's records as "(1) Without veteran preference with efficiency rating of 'good' or better. (2) Serving under an appointment with the equivalent of permanent competitive status in the classified civil service." —and were assigned *"according to tenure of employment"* to the retention subgroup A-2 of the regulations (R. 48, 51). At the same time, each of the veteran petitioners was carried on the respondent's records as "(1) With veteran preference with efficiency rating of 'good' or better. (2) Serving under an appointment for the duration of the war and six months thereafter." —and assigned *"according to tenure of employment"* to the inferior retention subgroup B-1 (R. 48, 38-39).

The petitioners each sued as a plaintiff in District Court June 5, 1947, to enjoin the Secretary of Agriculture from discharging him (R. 2, 76, 7, 82). After discharge, each continued his effort, by amended and supplemental complaint, to obtain an adjudication that he had been wrongfully discharged and should be reinstated (R. 13, 49, 84-85). The District Court entered summary judgments for the defendant Secretary before answer (R. 74), stating in its opinion: "It seems clear that plaintiff was a war service appointee and did not have a permanent Civil Service status. His separation was effected in full compliance with the applicable statutes and regulations." (R. 72).

On appeal, the Court of Appeals adhered to the same general thesis (R. 88, 184 F. 2d 219), upholding the paramount overall retention priority effect given "tenure of employment" by the regulations, and holding that petitioners, as veterans' preference employees whose efficiency ratings are "good" or better, have retention preference only over employees in subgroup B-2 and lower, and have no preference whatever over any of the eight nonveterans with classified tenure in subgroup A-2 who were retained in preference to the veteran petitioners.

§ 20.3 of the Civil Service Commission regulations (12 F. R. 2850; 5 Code Fed. Regs. § 20.3 Supp. 1947), presumably promulgated pursuant to § 12 of the Act of 1944, provides that, "for the purpose of determining relative retention preference in reductions in force", employees in each "competitive level" [e. g. "Attorney, Grade P-3"]—veterans as well as nonveterans—"shall be classified *according to tenure of employment* in competitive retention groups and subgroups as follows:"

> *Group A:* All employees with equivalent of permanent or classified civil service tenure.
>
> *Group B:* All employees serving under appointments limited to the duration of the present war, or otherwise limited to a period in excess of one year.

Group C: All employees serving under appointments limited to one year or less.

Each Group, in turn, is subdivided into four subgroups:

A-1. With veteran preference unless efficiency rating is less than "Good".

A-2. Without veteran preference unless efficiency rating is less than "Good".

A-3. With veteran preference where efficiency rating is less than "Good".

A-4. Without veteran preference where efficiency rating is less than "Good".

B-1. With veteran preference unless efficiency rating is less than "Good".

B-2. Without veteran preference unless efficiency rating is less than "Good". * * * *

In case of a reduction in force the regulations require (§ 20.8) that within each "competitive level" [e. g. "Attorney, Grade P-3"] employees shall be released by starting with the lowest subgroup, C-4, and proceeding upward in inverse order—C-4, C-3, C-2, and so on, releasing all employees in each lower subgroup before proceeding to the next higher subgroup, *et seq.*

REASONS FOR GRANTING THE WRIT.

I.

In upholding retention preference for nonveteran nonpreference employees having the equivalent of classified civil service tenure under subgroups A-2, A-4, over veterans' preference employees whose efficiency ratings are "good" or better under subgroups B-1, C-1, —*"according to tenure of employment"* instead of according to the pro-

viso mandate of absolute retention preference for such veterans—the court below has decided an important question relating to the construction of the Veterans' Preference Act of 1944 and earlier Federal statutes, and failed to give proper effect to applicable decisions of this Court, cited *infra*, in the respects indicated.

(a) In failing to hold that the long standing retention preferences of veterans given by Congress in the proviso of § 3 of the Act of August 15, 1876, and greatly strengthened by the proviso of § 4 of the Act of August 23, 1912, have been broadened, and in no respect narrowed by the Veterans' Preference Act of 1944, and embodied in the Act of 1944. *Hilton* v. *Sullivan*, 334 U. S. 323, 335-339; and in failing to hold that, whatever the scope of veterans' retention preference rights prior to the enactment of the Veterans' Preference Act of 1944, the absolute retention preference rights given by the proviso of § 4 of the Act of August 23, 1912, must be deemed to have been broadened by § 2 of the Veterans' Preference Act of 1944 to comprise the unclassified civil service and veterans' preference employees of non-classified civil service status, as well as the classified civil service and veterans of classified civil service status.

(b) In failing to find that § 2 of the Veterans' Preference Act of 1944 commands that preference in retention shall be given in the unclassified civil service, as well as in the classified civil service, and in failing to hold that § 2 of the Veterans' Preference Act of 1944 is to be regarded as a legislative recognition and declaration by Congress that the absolute retention preferences of veterans given by the proviso of § 4 of the Act of August 23, 1912, *applied in 1912 and still apply since 1944* in respect of veterans' preference in retention in the unclassified civil service, as well as in the classified civil service, and has never been confined in application to the classified civil service or veterans of classified civil service status. *Weedin* v. *Chin*

Bow, 274 U. S. 657, 668; *Blair* v. *City of Chicago*, 201 U. S. 400, 475; *Johnson* v. *Southern Pacific R. Co.*, 196 U. S. 1, 21; *Wetmore* v. *Markoe*, 196 U. S. 28, 76-77; *Cope* v. *Cope*, 137 U. S. 682, 688; *Bailey* v. *Clark*, 21 Wall. 284, 288; *United States* v. *Freeman*, 3 How. 556, 564-565; *Alexander* v. *Alexandria*, 5 Cranch, 1, 7; *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 277.

(c) In failing to uphold "the elementary rule that exceptions from a general policy which a law embodies should be strictly construed, that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment;" *Spokane & Island R. Co.* v. *United States*, 241 U. S. 344, 350; *Piedmont & Northern Ry.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311-312; and in failing to hold that § 2 of the Veterans' Preference Act of 1944 embodies and is declarative of the general policy and long established purpose of Congress to secure substantial preference [i. e. priority in right] in retention in employment in the Government service, expressed in the absolute command of § 2 of the Act that such "preference shall be given" to designated veterans, their wives and unmarried widows, in the unclassified civil service, as well as in the classified civil service, and in the comprehensive scope defined in § 2 of the Act of 1944.

(d) In erroneously holding that: "Elder's [petitioners'] preference does not arise from the proviso of § 4 of the Act of 1912 because the application of that section is confined by its terms to those having classified civil service status." (R. 91; 184 F. 2d 219, 221); and in failing to hold that: "There is nothing ambiguous about this 1912 provision. It was an absolute command that no governmental department should discharge, drop, or reduce in rank any honorably discharged veteran government employee with a rating of 'good'." *Hilton* v. *Sullivan*, 334 U. S. 323, 336.

(e) In failing to hold that the proviso of § 4 of the Act of August 23, 1912, is to be interpreted as an independent

and substantive provision separate and distinct from the context of the section in which it is found, and as intended to apply generally to all cases within the meaning of the language used. *McDonald* v. *United States*, 279 U. S. 12, 20-21; *Springer* v. *Government of the Philippine Islands*, 277 U. S. 189, 207; *United States* v. *Babbit*, 66 U. S. 55, 61; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 242, 246; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 181; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36, 37; and in failing to observe and hold that this Court so construed the proviso of § 4 of the Act of August 23, 1912, in the case of *Hilton* v. *Sullivan*, 334 U. S. 323, 336.

(f) In failing to hold that tenure of employment, military preference, length of service, and efficiency ratings are to be given the "due effect" required by the *first clause* of § 12 of the Veterans' Preference Act of 1944 by their consideration in the determination of retention preferences as between veteran and veteran and as between nonveteran and nonveteran. Cf. *Hilton* v. *Sullivan*, 334 U. S. 323, 335.

(g) In failing to hold that the first part of the second proviso of § 12 of the Veterans' Preference Act of 1944 is to be regarded as the congressional creation of a class of veterans' preference employees who "shall", if they have the defined efficiency ratings of "good" or better, be retained in preference to all other competing employees without regard to tenure of employment and length of service as between veterans and nonveterans. *McDonald* v. *United States*, 279 U. S. 12, 20-21; *Springer* v. *Government of the Philippine Islands*, 277 U. S. 189, 207; *United States* v. *Babbit*, 66 U. S. 55, 61; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 242, 246; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 281; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36-37; Cf. *Hilton* v. *Sullivan*, 334 U. S. 323, 335-336.

(h) In failing to uphold the settled rule that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each. *Market Co.* v. *Hoffman,* 101 U. S. 112, 115-116; *Ex parte Public National Bank,* 278 U. S. 101, 104; and in failing to hold that the Civil Service Commission regulations, applied herein, have not accorded any meaning to the first part of the second proviso of § 12 of the Act of 1944 that is consistent with the requirements of law.

(i) In failing to hold that the first part of the second proviso of § 12 of the Veterans' Preference Act of 1944 is substantially the same as the 1912 provision which provided for an absolute retention preference without regard to tenure of employment and length of service. Cf. *Hilton* v. *Sullivan,* 334 U. S. 323, 338.

(j) In failing to hold that the first part of the *second* proviso of § 12 of the Veterans' Preference Act of 1944 is to be interpreted as a special withdrawal and exception of the class of veterans' preference employees whose efficiency ratings are "good" or better from the operation and operative effect of the general terms of the first clause of § 12 of the Veterans' Preference Act of 1944. *Cox* v. *Hart,* 260 U. S. 427, 435; *McDonald* v. *United States,* 279 U. S. 12, 20-21; *United States* v. *Morrow,* 266 U. S. 531, 534-535; *White* v. *United States,* 191 U. S. 545, 551; *Chesapeake & Potomac Tel Co.* v. *Manning,* 186 U. S. 238, 242-246; *Georgia Railroad & Banking Co.* v. *Smith,* 128 U. S. 174, 181; *Minis* v. *United States,* 15 Pet. 423, 445; Cf. especially the specific application of this general rule to the factor of length of service which was alone in issue between a nonveteran employee and veterans of the same classified tenure of employment, in *Hilton* v. *Sullivan,* 334 U. S. 323, 335.

§ 20.3 of the CSC regulations, *supra,* attempts to give due effect to the four factors of the *first clause* of § 12 of the Act of 1944, by first segregating all the Attorneys, Grade P-3, in the "competitive level" so designated, and

then seeing that these Attorneys, Grade P-3, are "classified *according to tenure of employment*" among the categories designated as Groups A, B, and C.

"*Tenure of employment*" is thus given effect as the *overall and paramount criterion* for priority in the right to be retained, per Groups A, B, and C.

Permanent or classified tenure of employment is given supreme effect as the highest value in the scale of retention priority, per Group A.

"*Military preference*"—under the appellation "veteran preference"—is given a very secondary effect as a sort of minor abscissa within and subordinated to the overall and paramount criterion of "tenure of employment", e. g. A-1, B-1, C-1, A-3, B-3, C-3.

"*Efficiency ratings*" are given a staggered abscissa value conjointly with "military preference".

"*Length of service*" is given effect within the subgroups by remote control from § 20.2 (b).

As above stated, *all* Attorneys, Grade P-3,—veterans as well as nonveterans—are *included* in the operative effect thus given by § 20.3 of the CSC regulations to the general terms of the *first clause* of 12 of the Veterans' Preference Act of 1944. *None* of the proviso-excepted class of veterans' preference Attorneys, Grade P-3, whose efficiency ratings are "good" or better has been *withdrawn or excepted* from the operation and operative effect of such general terms of the first clause of § 12 of the Act of 1944.

The regulations of the Civil Service Commission thereby assumed the legislative power of altering, amending, and modifying this Act of Congress by subtracting and eliminating the settled legal function of the applicable proviso which also contains an absolute command of the Congress. Administrative rulings cannot add to, or subtract from, the terms of an Act of Congress. *United States* v. *Stand-*

ard Brewery Co., 251 U. S. 210, 217-220; *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, 508.

As said by this Court in *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610:

> "The limits of the power to make regulations are well settled. (cit. cas.) They may not extend a statute or modify its provisions."

Again, in *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 134, this Court said:

> "The power of an administrative officer or board to administer a federal statute and prescribe rules and regulations to that end is not the power to make laws—for no such power can be delegated—but to carry into effect the will of Congress as expressed in the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

The inceptive attention and weight to be given to contemporaneous construction of a statute by administrative officers charged with its execution is a rule of interpretation, but it is by no means an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. However long continued by successive officers, such administrative construction must yield to the positive language of the statutes. *Houghton* v. *Payne*, 194 U. S. 88, 100; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 330, 331; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322, 331; *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 740, 757, 759; *Texas & Pacific R. Co.* v. *United States*, 289 U. S. 627, 640; *United States* v. *Tanner*, 147 U. S. 661. If the language is plain and the meaning clear, the duty of interpretation does not arise and the sole function of the courts is to enforce the statute according to its terms. *Caminetti* v. *United States*,

242 U. S. 470, 485; *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 409; *Dewey* v. *United States*, 178 U. S. 510, 520, 521; *Houghton* v. *Payne, supra.*

Under the positive language of § 12, viewed in its significant relation with § 2 and § 18 of the Veterans' Preference Act of 1944 and the provisions of earlier statutes embodied in the Act of 1944, the respondent Secretary was clearly and mandatorily required to retain these veteran petitioners in their positions as Attorneys, Grade P-3, in preference to all other nonveteran nonpreference Attorneys, Grade P-3 [i.e. all Attorneys, Grade P-3, who are without veteran preference]; and respondent's admitted failure so to do violated petitioners' legal rights under these applicable statutes.

II.

In upholding retention preference for nonveteran nonpreference employees having the equivalent of classified civil service tenure over veterans' preference employees whose efficiency ratings are "good" or better—according to tenure of employment instead of according to the proviso mandate of absolute retention preference for such veterans—the court below has decided a question of substance and general importance relating to the construction of the Veterans' Preference Act of 1944 and earlier Federal statutes which has not been, but should be, settled by this Court.

(a) The court below erred in holding, in respect of § 20.3 of the CSC regulations for reductions in force, *supra*, that: "Those classifications and the subgroups into which they were divided, which are reproduced below, [footnote 4, R. 91-93; 184 F. 2d 219, 221] were approved by us in the Hilton case. We do not read the Supreme Court's opinion in *Hilton* v. *Sullivan*, 1948, 334 U. S. 323, as holding to the contrary."

There was no merit in the Government's contention, thus adopted by the Court of Appeals, which was that in up-

holding the validity of the absolute retention preference of veterans of classified-permanent tenure of employment given under subgroups A-1 Plus and A-1, the Supreme Court in the case of *Hilton* v. *Sullivan* approved and affirmed the validity of the regulations for reductions in force *in toto* or "of necessity affirmed the validity of the primary division between A and B based on the tenure of employment of employees." (Govt's Brief below, p. 16) As repeatedly stated by this Court:

> "The most that can be said is that the point was in the record if anyone had seen fit to raise it. Questions that merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Kvos, Inc.* v. *Associated Press*, 299 U. S. 269, 279; *Webster* v. *Fall*, 266 U. S. 507, 511.

The public interest will be promoted by settlement in this Court of the important questions involved.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition should be granted.

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December, 1950.